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197 NLRB No. 18

D—5931
Los Angeles, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 31—CE—28

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

and

LUFTHANSA GERMAN AIRLINES

and

MARRIOTT IN-FLITE SERVICES, DIVISION OF MARRIOTT CORPORATION

Decision and Order

Upon a charge duly filed by Marriott In-Flite Services, Division of Marriott Corporation, hereinafter Marriott, on March 19, 1971, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on May 14, 1971, against International Association of Machinists & Aerospace Workers, AFL-CIO, hereinafter IAM or the Union, and Lufthansa German Airlines, hereinafter Lufthansa or the Company, alleging that Respondents IAM and Lufthansa had engaged in, and were engaging in, unfair labor practices within the meaning of Section 8(e) of the National Labor Relations Act, as amended, by entering into, and giving effect to, an agreement whereby Lufthansa agreed to cease doing business with Marriott. IAM and Lufthansa filed answers on May 27, 1971, and June 7, 1971, respectively, denying the commission of any unfair labor practices.

On June 30, 1971, the parties executed a stipulation by which they waived a hearing before a Trial Examiner and the issuance of a Trial Examiner's Decision and recommended Order and agreed to submit the case to the Board for findings of fact, conclusions of law, and an order based upon a record consisting of the charge, the complaint and notice of hearing, the answers, and the stipulation of facts and exhibits attached thereto.

On July 14, 1971, the Board approved the stipulation of the parties and ordered the proceeding transferred to the Board, granting permission and time for the filing of briefs. Thereafter, the General Counsel, Marriott, IAM, and Lufthansa each filed a brief.[1]

Upon the basis of the stipulation, the briefs, and the entire record in this case, the Board makes the following:

FINDINGS OF FACT

I. The Business of the Employer

Marriott, a Delaware corporation, is engaged in the business of providing in-flight food services for various airlines at airports in several cities and States of the United States, including Los Angeles, California. During the 12-month period preceding the filing of the charge herein, Marriott, in the course and conduct of its business operations, purchased and received at its Los Angeles in-flight kitchen goods valued in excess of $50,000 directly from points outside the State of California and shipped from Los Angeles goods valued in excess of $50,000 directly to points located outside the State of California. We find that Marriott is engaged in commerce within the meaning of the Act and that it will effectuate the puoposes of the Act to assert jurisdiction herein.[2]

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[1] The parties' request for oral argument is hereby denied as the record adequately presents the issues and positions of the parties.

[2] *Siemons Mailing Service*, 122 NLRB 81.

II. The Labor Organization Involved

IAM is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning terms and conditions of employment. Approximately 88 percent of IAM's membership are employees within the meaning of Section 2(3) of the Act; the remainder of its membership are employees who are covered by the Railway Labor Act. More than 96 percent of the Union's collective-bargaining agreements are with employers within the meaning of Section 2(2) of the Act; the balance are with employers who are subject to the Railway Labor Act. We find that IAM is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. The Unfair Labor Practices

A. *Facts*

Lufthansa, a corporation existing under the laws of the Federal Republic of Germany, provides air transportation of passengers and goods to and from points within the United States and other countries. It is a "carrier by air" within the meaning of section 201 of the Railway Labor Act (45 U.S.C. § 151, et seq.) and, therefore, is not an employer within the meaning of Section 2(2) of the Act.[4]

In connection with its flight operations, Lufthansa maintains a catering facility at John F. Kennedy (JFK) Airport in New York City that prepares some of the food for the Company's flights from JFK. In 1961 Lufthansa recognized the Union as the exclusive collective-bargaining representative of Lufthansa's catering employees in a craft or class certified by the National Mediation Board under the

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[3] Cf. *International Brotherhood of Electrical Workers (B. B. McCormick and Sons, Inc.)*, 150 NLRB 363, 371, enfd. *per curiam* 350 F.2d 791 (C.A.D.C.), cert. denied 383 U.S. 943.

[4] Section 2(2) of the Act excludes from the definition of "employer" "any person subject to the Railway Labor Act."

Railway Labor Act. This "unit" encompasses all such employees working for the Company in the United States, its possessions, its territories, and Puerto Rico.

However, because the Company historically employed catering department personnel only at JFK, and it contracted out catering services at the other airports from which it operates, the successive collective-bargaining agreements executed by the parties from 1961 to 1971 have contained memoranda of understanding whereby IAM waived its jurisdiction over the non-JFK work and permitted Lufthansa to contract out for such services in the following instances:

(a) Work historically performed prior to the date of the signing of the Agreement;

(b) Where catering facilities are not provided;

(c) Where the work load is such that the facilities and/or personnel are not sufficient to accomplish the work, provided that no lay-off results.

Pursuant to the above memoranda the airline continued the contractual relationship with Marriott it had begun in 1956 for the catering of all Lufthansa flights from Chicago's O'Hare Airport. In January 1969, the Company contracted with Continental Airlines for the preparation of food for all Lufthansa flights from Los Angeles International Airport. Other contractors were utilized during this period at Boston (Marriott), Anchorage (Northwest Orient Airlines), and Philadelphia (Ogden Foods). All of the above save Marriott are unionized.

The Company became dissatisfied with Continental's service in Los Angeles and terminated its contract with that airline as of December 1, 1969, when Marriott began providing food for Lufthansa's Los Angeles flights. Four employees represented by the Union were discharged when Continental's contract with Lufthansa was terminated. At or about the same time, Marriott and the Company dis-

cussed the possibility of Marriott's providing catering service for the airline's Boeing 747 jet flights from JFK.

In late 1969 IAM and Lufthansa commenced negotiating a collective-bargaining agreement to replace the contract covering catering employees then due to expire in mid-1970. During the discussions, union representatives pressed the Company to sever its relationship with nonunion caterer Marriott. Lufthansa's catering manager for North and Central America informed Marriott officials soon after Marriott had assumed the Los Angeles work that IAM had given the Company a time limit in which to find a union caterer in Los Angeles. The Union also unequivocally refused to permit contracting by the Company with Marriott at JFK.

Eventually, on February 12, 1971, the Company and the Union executed a renewal collective-bargaining agreement effective retroactively from June 1, 1970, to May 31, 1973. The contract contains, *inter alia*, the following memorandum of understanding which the General Counsel alleges violates Section 8(e) of the Act:

> IT IS HEREBY MUTUALLY AGREED THAT THE Union grants a waiver of Article II (a) and (b) of the Agreement [Scope of Agreement] between the Company and the International Association of Machinists and Aerospace Workers to the following extent:
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> * * * * * * * * *
>
> A. The Company and the Union agree as follows concerning the performance of catering work at John F. Kennedy Airport, since the workload is such that the facilities at JFK are not sufficient to accomplish the work:
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> 1. The Company will continue to prepare meals and food in its own flight kitchen to the extent the facilities permit.
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> * * * * * * * * *

5. The Company shall engage Chefs Orchid for the performance of that catering service which, in conformity with paragraph 1 and 2, above, it is unable to perform in its own flight kitchen. . . .

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B. The Company and the Union agree where catering facilities are not provided, the Company may continue to farm out the work and shall engage the following caterers to perform its catering service at the following location:

LOCATION	CATERER
Los Angeles	Chefs Orchid
Anchorage	Northwest Airlines
Boston	Marriott
Philadelphia	Ogden Foods (Berlo)
Chicago	Chefs Orchid

In the event that the Company undertakes to perform the catering service for scheduled flights at any other location, the Company shall give the Union (60) days written notice of its intention to do so, and during that sixty (60) day period the Company and the Union shall attempt to agree upon the caterer to perform the catering service at the new location. In the event that the Company and the Union do not agree upon a Union caterer within that period, for reasons of quality, service or price, the company may then select a caterer of its choice.

C. In the event that the Company determines that a caterer named in, or hereafter selected in accordance with, paragraphs A or B above fails to meet the Company's requirements as to quality, service or price, the Company shall give the Union sixty (60) days written notice of its desire to change to another caterer, and during that sixty (60) day period the Company and the Union shall attempt to agree upon a new caterer. In

> the event that the Company and the Union do not agree upon a Union caterer within that period, the Company may then select a caterer of its choice.

In early March 1971, Lufthansa informed Marriott that pursuant to the above memorandum the airline would have to terminate its contracts with Marriott at Los Angeles and Chicago.[5] Lufthansa ended its Los Angeles Marriott service on May 15, 1971, and had planned to cancel the Chicago contract on June 1. At the same time, the airline engaged Chef's Orchid[6] to replace Marriott at Los Angeles and Chicago, and to supplement its operations at JFK. However, on May 26, 1971, the Regional Director for Region 31 secured a temporary injunction in the United States District Court for the Central District of California, under Section 10(1) of the Act, which injunction, as amended on May 28, had the effect of preventing the cancellation of the Lufthansa-Marriott contract at Chicago and reinstating the parties' relationship in Los Angeles.

B. *The Issue Involved and Contentions of the Parties*

Section 8(e), which was added to the Act in 1959, in relevant part provides:

> It shall be an unfair labor practice for *any labor organization* and *any employer* to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any *other employer*, or to cease doing business with any other *person*, and any contract or agreement entered into here-

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[5] Marriott has catered Lufthansa's Boston flights for several years but the value of the food and service provided there was only $1,000 per year. This relationship was unaffected by the allegedly unlawful agreement.

[6] Chef's Orchid is a union caterer whose employees are not represented by IAM.

tofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . [Emphasis supplied.]

Marriott and the General Counsel contend that the instant agreement violates Section 8(e) even though Lufthansa is not an "employer" within the meaning of the Act because Congress intended Section 8(e) to outlaw hot cargo agreements executed by labor organizations and employers in the generic sense of the words. They also contend that, because Section 8(e) and Section 8(b)(4)(B) are complementary secondary boycott provisions of the Act, the term "any employer" of Section 8(e) should be construed as synonymous with "any person," as that phrase is used in Section 8(b)(4)(B).[7]

IAM and Lufthansa, whose arguments will be considered together, contend that Section 8(e) only outlaws hot cargo agreements which are executed by "employers" and "labor organizations" within the meaning of Section 2(2) and (5) of the Act, respectively. They argue, too, that the Board lacks jurisdiction over the labor relations of employers and employees who are subject to the Railway Labor Act. In particular, Lufthansa and IAM assert that, in amending the Act in 1959 to close certain loopholes in the secondary boycott provisions, Congress extended the Act's protection against secondary conduct to airlines but did not make various unfair labor practice prohibitions applicable to airlines or their employees.

C. *Discussion and Conclusion*

Assuming, *arguendo*, that the Board is empowered under Section 8(e) to determine the lawfulness of the instant agreement, it is clear that the memorandum of understanding executed by the parties on February 12, 1971, would constitute an unlawful hot cargo contract. The challenged

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[7] Section 2(1) of the Act defines "person" as including one or more corporations.

agreement in effect requires Lufthansa to cease doing business with Marriott and contract only with union caterers.[8] It is apparent from the record that the Union was primarily concerned with Marriott's status as a nonunion caterer and not with preserving work for unit employees especially since Lufthansa had never employed union members in the catering department except at JFK, where no catering jobs were being threatened.

As the Supreme Court stated in *National Woodwork Manufacturers Association* v. *N.L.R.B.*,[9] "The touchstone [of a hot cargo agreement] is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees . . ."[10] or is "tactically calculated to satisfy union objectives elsewhere."[11] In the latter case the boycotting employer is a neutral bystander, and the agreement or boycott is secondary.[12]

The crux, therefore, of the instant case is whether Congress intended to outlaw hot cargo agreements only when they were executed by statutory labor organizations and employers. Despite the seemingly clear language of Section 8(e), resort to the legislative history of the Act is warranted for, as the Supreme Court recently noted,

> . . . labor legislation is peculiarly the product of legislative compromise of strongly held views . . . . [L]egislative history may not be disregarded merely because it is arguable that a provision may unambiguously em-

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[8] The record does not reveal the reason for IAM's not requiring the Company to cease doing business with Marriott in Boston and retain there a union caterer but we note that the value of the service rendered in Boston was less than $1,000 per year.

[9] 386 U.S. 612.

[10] *Id.* at 645.

[11] *Id.* at 644.

[12] *Id.* at 644-645.

> brace conduct called in question. . . . [T]he section must be construed in light of the fact that it "is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy."[13]

As enacted in 1947, Section 8(b)(4)(A) of the Act (now Section 8(b)(4)(B)) made it an unfair labor practice for a labor organization, *inter alia*, to induce or encourage the "employees of any employer" to engage in a strike or certain other concerted activities where an object of such conduct was forcing or requiring any employer or other person to cease doing business with any other person. In 1959 Congress sought "to close certain loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions."[14]

Thus, in *International Rice Milling*,[15] the Board held that the phrase "employees of any employer" meant that Congress intended in Section 8(b)(4)(A) only to prohibit union inducement or encouragement of employees of statutory employers. There, the Board found that it was not unlawful for a Teamsters local to induce railroad employees to cease handling the goods of certain rice mills which the Teamsters had struck.[16] The Fifth Circuit Court of Appeals disagreed with the Board's interpretation of Section 8(b)(4)(A), holding that the words "any employer" embraced the "class of employers as a whole, and not merely those

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[13] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 175, 179-180.

[14] *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 51.

[15] 84 NLRB 360.

[16] In *Local 25, Teamsters* v. *N.Y., N.H. & H. RR. Co.*, 350 U.S. 155, the Court under similar circumstances held that a railroad could file a charge under Sec. 8(b)(4)(A); "since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practices proscribed by § 8(b)(4)(A)." *Id.* at 160.

within the [statutory] definition of 'employer.'"[17] In affirming the Board's order, the Supreme Court did not pass upon the conflict between the Board and the Fifth Circuit on the issue.[18] Consequently, under the Board's holding unions could enlist the aid of nonstatutory agricultural, governmental, railroad, or airline employees to carry out secondary boycotts without violating Section 8(b)(4)(A). And, by its terms, Section 8(b)(4)(A) did not proscribe such union conduct directed against employers of such employees. In *Local 1976, Carpenters* [*Sand Door*] v. *N.L.R.B.*,[19] the Supreme Court held that a hot cargo clause in a collective-bargaining agreement was not *per se* unlawful, although it was not a defense to secondary boycott activity.

As the Court noted in *Servette, supra,* in 1959 Congress was cognizant that the above decisions and other Board and court pronouncements had created large loopholes in Section 8(b)(4)(A).[20] The Senate bill introduced by Senator John Kennedy (S. 1555) contained no proposed changes in Section 8(b)(4)(A), however. The so-called administration bill sponsored by Senators Goldwater and Dirksen (S. 748), which was adopted by the House in relevant part as H.R. 8400, but was rejected in the Senate after being introduced from the floor by Senator Dirksen, would have amended the Act's secondary boycott provisions significantly.

As discussed by Senators Dirksen and Goldwater in their minority report on S. 1555, S. 748 would have overruled the Board's decision in *International Rice Milling, supra,* by

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[17] *International Rice Milling Co., Inc.* v. *N.L.R.B.*, 183 F.2d 21, 25 (C.A. 5).

[18] *International Rice Milling Co., Inc.* v. *N.L.R.B.*, 341 U.S. 665, 668, fn. 2.

[19] 357 U.S. 93.

[20] See, e.g., 1 Leg. Hist. 476 (LMRDA, 1959) (S. Rept. No. 187 on S. 1555; minority views).

making Section 8(b)(4)(A)'s restrictions applicable not solely to conduct directed at employees of statutory employers but also to union conduct designed to "threaten, coerce, or restrain any person engaged in commerce" and to "induce or encourage any individual employed by any person." They stated:

> Under the definition section of the Taft-Hartley Act railroad employees, agricultural workers, and governmental employees are not employees within the meaning of the act. The Board has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices . . . .
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> Secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else.[21]

After S. 748 was introduced on the Senate floor, Senator Goldwater commented that the bill would

> . . . extend the protection of the secondary boycott provisions of the act to . . . railroads . . . without subjected them to *other* provisions of the act.[22] [Emphasis supplied.]

By proposing to make it unlawful under Section 8(b)(4)(A) for a union to engage in proscribed conduct to force or require

> . . . *any person* . . . *to agree* to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or *to agree* to cease doing business with any other person . . . [Emphasis supplied.]

S. 748 would have modified the Board's *International Rice Milling* decision, *supra*, by banning certain union conduct directed against "any person" (for example, an airline or

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[21] I Leg. Hist. 476.

[22] II Leg. Hist. 1079.

railroad) where the object was securing that persons's assent to, or compliance with, a hot cargo clause. However, S. 748 would not have altered the dictum in *Sand Door* that hot cargo agreements are not unlawful *per se*.

Senator Gore introduced a limited ban on hot cargo clauses which, as amended by Senators McClellan and Smathers, was passed by the Senate in the following form:

> It shall be an unfair labor practice for any labor organization and any employer who is a common carrier subject to Part II of the Interstate Commerce Act [23] to enter any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer or to cease doing business with same.

Senator Gore indicated that he introduced the above amendment because "it would be contrary to the public interest for . . . a common carrier to enter into a contract to refuse to deliver goods to certain employers" inasmuch as the Government had given the carrier a franchise to serve the public on a particlar route.[24]

In the House, the bill introduced by Congressman Elliot and reported by the Committee on Education and Labor (H.R. 8342) proposed no relevant, substantive amendments to Section 8(b)(4) but it proposed to adopt *in toto* Senator Gore's amendment to S. 1555. The House minority report termed this "a minor step in the right direction. . . . By

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[23] The provisions of part II of the Interstate Commerce Act (49 U.S.C. § 301, *et seq.*) apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. 49 U.S.C. § 302 (a).

[24] II Leg. Hist. 1161. Railroads and airlines enjoy similar franchises from the Government.

omission the committee bill would seem to put a stamp of *approval upon all other 'hot cargo' arrangements.*"[25] The House minority report also highlighted some of the loopholes in the secondary boycott provisions discussed above which the House committee bill did not close.

H.R. 8400, Congressman Landrum's substitute bill for H.R. 8342, proposed to amend then Section 8(b)(4)(A) and add Section 8(e) to read substantially as they appear in the Act today. As S. 748, H.R. 8400 would have made it unlawful for a union via proscribed means to force or require any person "to agree to cease, using, selling . . . or agree to cease, doing business with any other person. . . ." In explaining this amendment to Section 8(b)(4)(A), Representative Landrum stated:

> The committee bill would deal with this problem only in the very narrow way of proscribing the formal execution of "hot cargo" contracts with those employers subject to the Interstate Commerce Act, part II. There of course are thousands of employers not covered by such provisions, with whom the Teamsters, and other unions, could and surely would, execute and effectuate such agreements. By not prohibiting the others, by not naming them, the committee bill would indirectly sanction, if indeed not approve, their execution. *I submit if such contracts are bad in one segment of our economy, they are undesirable in all segments.*[26] [Emphasis supplied.]

In a similar vein, then Congressman Griffin, after noting that, in light of the proposed substitution of the term "any person" for "any employer" in Section 8(b)(4), railroad employees would be covered by the Act's secondary boy-

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[25] I Leg. Hist. 855.

[26] II Leg. Hist. 1518.

cott provisions, commented on H.R. 8400's proposed Section 8(e):

> . . . the committee bill only nips at the heel of the problem by outlawing those hot cargo agreements which are made with common motor carriers. . . . Our substitute would ban all hot cargo agreements.[27]

After the substitute bill (H.R. 8400), containing current Section 8(e) and Section 8(b)(4)(B)'s proposed ban on hot cargo agreements obtained by unions from "persons" as a result of prohibited union conduct, was passed by the House, Senator John Kennedy and Congressman Thompson issued a comparison of the Senate and House bills which in relevant part noted:

> The House bill extends the prohibition to secondary boycotts by . . . employees of railroads and airlines. Apparently the theory is that the omission was simply a mistake in the original draftsmanship.
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> The unions argue that since these groups receive none of the benefits of the NLRA they should be subjected to none of the burdens. The railway labor organizations particularly dislike the prospect of involvement with the NLRB. These arguments have some appeal but they do not carry much weight since *the employees who would be forbidden to engage in secondary boycotts have little to gain or lose from such activity.*[28] [Emphasis supplied.]

The conference committee considered the Senate's approach to the problem of hot cargo agreements (Senator Gore's limited ban on such agreements) and the House bill's

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[27] II Leg. Hist. 1568. Representative Griffin also stated that "there is no valid reason why this prohibition [in the Gore amendment] on hot cargo contracts should apply only to the carriers subject to the Interstate Commerce Act." II Leg. Hist. 1523.

[28] II Leg. Hist. 1706-07.

two-pronged attack thereon (current Section 8(e)'s ban on all such clauses executed by "any labor organization and any employer" and the proposal in Section 8(b)(4)(B) to make it an unfair labor practice for a union via proscribed means to force or require "any person" to execute a hot cargo agreement) and reported a bill that was enacted by Congress without further amendment to the relevant sections. The conference bill, however, deleted Section 8(b)(4)(B)'s proposal to make it unlawful for a labor organization via proscribed means to force or require

> . . . any person . . . to agree to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to agree to cease doing business with any other person. . . .

The accompanying conference committee report stated:

> The conference committee adopted the provisions of the House amendment with the following changes: (1) the phrase "or agree to cease" was deleted from section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were *included in the other provisions dealing with prohibitions against entering into "hot cargo" agreements*, and therefore their retention in section 8(b)(4)(B) wou'd *constitute a duplication of language*. . . .
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> The House amendment amends section 8 of the National Labor Relations Act, as amended, by adding at the end thereof a new subsection (e). . . .[29] [Emphasis supplied.]

It is apparent from the above discussion of the legislative history of Section 8(e) and Section 8(b)(4)(B) that Congress in 1959 intended to make it an unfair labor practice

[29] I Leg. Hist. 942-943.

for a labor organization, regardless of the conduct engaged in by the union, *to agree* with "any person" *that the latter* would cease doing business with any other person. Thus, despite its use of the phrase "any employer" in Section 8(e), it is clear from the above that Congress intended to enact in Section 8(e) a ban on hot cargo agreements at least as encompassing as the ban envisaged by the drafters of Section 8(b)(4)(B) which would have applied to hot cargo clauses executed by "any person." Otherwise, the conferees could not have determined that the language of Section 8(e) was a duplication of the terminology contained in the proposed hot cargo amendment to Section 8(b)(4)(B) which they deleted from the bill.

This interpretation of Section 8(e) is supported by a recent Supreme Court decision involving that section of the Act. In *National Woodwork Manufacturers Association* v. *N.L.R.B.*, *supra*, the Court, in holding that a work preservation agreement did not violate Section 8(e), noted in passing that "the language of § 8(e) is sweeping, [but] it closely tracks that of § 8(b)(4)(A) [now 8(b)(4)(B).]"[30] And, the "substitute Landrum-Griffin bill . . . expanded the [Senate] proposal to cover all industry and not common carriers alone."[31]

In his dissent in the same case, Justice Stewart, citing the Board's decision in *Ohio Valley Carpenters District Council (Cardinal Industries)*,[32] wrote:

> As the Court observes, the sweep of § 8(e) is no greater than that of § 8(b)(4). By the same logic, it is no narrower.[33]

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[30] 386 U.S. at 635.

[31] *Id.* at 637.

[32] 136 NLRB 977.

[33] 386 U.S. at 660.

In *Ohio Valley*, the Board stated:

> . . . the validity of a restrictive agreement challenged under 8(e) must be considered in terms of whether that agreement, if enforced by prohibited means, would result in an unfair labor practice under Section 8(b)(4)(B). Clearly, there is little point and no logic in declaring an agreement lawful under 8(e), but in finding its enforcement condemned under 8(b)(4)(B). . . .[34]

In this latter regard, Lufthansa and IAM, citing *Railroad Trainmen* v. *Terminal Co.*[35] for the proposition that in 1959 Congress did not expand the class of employees or labor organizations whom the Act forbade to engage in secondary activities, contend that Section 8(e), and implicitly Section 8(b)(4)(B), do not prohibit the execution or enforcement of the instant agreement. They concede, however, that in 1959 Congress extended the protection of the secondary boycott provisions to railroads and airlines. However, it is clear beyond peradventure, and Respondents do not argue contra, that had IAM induced Lufthansa's employees to strike or engage in other concerted activity to force the Company to cease doing business with Marriott, the Union would have violated Section 8(b)(4)(B).[36] And, as the Board, with Court approval reasoned in *Ohio Valley*, it would be illogical to find unlawful a strike by IAM to force Lufthansa to cease doing business with Marriott under Section 8(b)(4)(B), while holding that a contract executed by IAM and Lufthansa designed to achieve the identical

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[34] 136 NLRB at 987.

[35] 394 U.S. 369.

[36] See, e.g., *IBEW* (*B. B. McCormick and Sons, Inc.*), *supra*, fn. 3.

result was not proscribed by Section 8(e).[37] Nor do we believe that Congress, in closing a multitude of secondary boycott provision loopholes in 1959, intended that the Board create another loophole by reaching the result Respondents seek. Finally, as the above discussion of the legislative history of Section 8(e) and Section 8(b)(4)(B) clearly indicates, in 1959 Congress did intend to prohibit

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[37] Our conclusion that the term "employer" contained in Section 8(e) was not intended by Congress to refer to a statutory employer is further buttressed by the language of Section 8(b)(4)(A) of the 1959 amendments, which prescribes certain conduct for an object of "forcing or requiring *any employer* or *self-employed person* to join any labor or employer organization or *to enter into any agreement which is prohibited by Section 8(e).*" (Emphasis supplied.) We do not believe that Congress intended to outlaw certain conduct which has as an object an agreement prohibited by Section 8(e) between a self-employed *person* and a labor organization but at the same time legislated to place out of reach of the statute such an agreement if voluntarily executed. Also in this connection we find noteworthy the commingled use of the phrase "any person" with the term "employer" in the apparel and clothing industry proviso to Section 8(e). Such mixed and interchangeable use of the terms "employer" and "person" further convinces us that Congress did not intend to restrict in Section 8(e) the meaning of the word "employer" to that defined in Section 2(2) of the Act, but, rather, used it in the generic or the dictionary sense. Further support for such conclusion is contained in the extension of remarks of Senator Goldwater on the 1959 amendments, II Leg. Hist. 1829, as follows:

> Employers are protected against secondary boycotts even though one of the two employers involved is a railroad employer, or an agricultural employer—they're also exempt—or a governmental body—municipality, or a non-profit hospital. These are all employers who are not included in the definition of employer under Taft-Hartley and that, therefore, you didn't have a violation of secondary boycott if they were one of the parties involved. *Now the term "employer" is actually employer in its dictionary sense.* So that's the second loophole that's covered. [Emphasis supplied.]

airline employee unions from engaging in the instant conduct.[38]

Railroad Trainmen, supra, is inapposite to the circumstances of the instant case. There, labor organizations composed predominantly and overwhelmingly of employees subject to the Railway Labor Act picketed a terminal owned by several railroads in furtherance of a dispute over terms and conditions of employment for railroad employees they had with the Florida East Coast Railway. The Court held that that was a "railway labor dispute, pure and simple"[39] and that "there is absolutely no warrant for incorporating into [the Railway Labor Act] the panoply of detailed law developed by the National Labor Relations Board and the courts under § 8(b)(4)."[40] Here, the labor organization involved, IAM, is composed overwhelmingly of nonrailroad or nonairline employees, the dispute is not over the terms and conditions of employment of airline employees,[41] but

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[38] See also the extension of remarks of Senator Dirksen on the 1959 amendments in which he stated: "The bill also brings under picketing and secondary boycott prohibitions of the bill and the Taft-Hartley Act several groups of workers not previously covered, including railroad, airline, farm, and local government workers." II Leg. Hist. 1823.

[39] 394 U.S. at 377.

[40] *Id.* at 391.

[41] In *Local 25, Teamsters, supra,* fn. 16, the Court stated at 160:

> We think it clear that Congress, in excluding "any person subject to the Railway Labor Act" from the statutory definition of "employer," carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act.

In finding unlawful the hot cargo agreement in the collective-bargaining agreement between IAM and Lufthansa, we are not interfering with the "employer-employee relationships" of employees and employers subject to the Railway Labor Act. The hot cargo provision has no impact on the terms and conditions of employment of Lufthansa's employees. Rather, it looks to the employment relationships of the nonairline employees of Marriott. Accordngly, the above quotation from *Local 25, Teamsters* we deem inapplicable to the present case.

of employees of an employer, Marriott, which is not subject to the Railway Labor Act, and the dispute involves one particlar section of the National Labor Relations Act which, in our opinion, Congress intended to be applicable to the present situation.

In sum, we find that the Board is empowered under Section 8(e) of the Act to determine the lawfulness of the instant agreement executed by IAM, a statutory labor organization, and Lufthansa, an airline within Section 2(1)'s definition of "any person."

Accordingly, for the reasons above, we find that by entering into and giving effect to the memorandum of understanding contained in the collective-bargaining agreement executed by the Company and the Union on February 12, 1971, IAM and Lufthansa violated Section 8(e) of the Act.

IV. The Remedy

Having found that Respondents IAM and Lufthansa have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Marriott In-Flite Services, Division of Marriott Corporation, is a person engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act; Lufthansa German Airlines is a person within the meaning of Section 2(1) and is an employer of employees who are represented by a statutory labor organization.

2. International Association of Machinists & Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into and giving effect to an agreement whereby Respondent Lufthansa German Airlines agreed to cease doing business with Marriott In-Flite Services, Respondent International Association of Machinists and Aero-

space Workers, AFL-CIO, and Respondent Lufthansa German Airlines violated Section 8(e) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Association of Machinsts & Aerospace Workers, AFL-CIO, its officers, agents, and representatives, and Lufthansa German Airlines, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining in effect, giving effect to, or enforcing a memorandum of understanding contained in a collective-bargaining agreement entered into by and between Respondent International Association of Machinists & Aerospace workers, AFL-CIO, and Respondent Lufthansa German Airlines on or about February 12, 1971, whereby Respondent Lufthansa German Airlines ceased or refrained or agreed to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation.

(b) Entering into, enforcing, or giving effect to any other contract or agreement, express or implied, wherby Respondent Lufthansa German Airlines ceases or refrains or agrees to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at the business offices and meeting halls of the aforesaid Union, and at the catering department facilities of the aforesaid Company in New York, Chicago, Los Angeles, Boston, Anchorage, and Philadelphia, copies of

the attached notice marked "Appendix."[42] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C.

May 31, 1972.

EDWARD B. MILLER, Chairman
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
JOHN A. PENELLO, Member
National Labor Relations Board

MEMBER FANNING, dissenting:

I dissent from my colleagues' holding that Section 8(e) of the Act proscribes certain conduct—i.e., the entering into of hot cargo agreements—by railroads, airlines, the Federal and state Government and their political subdivisions, the Federal Reserve bank, wholly owned Government corporations, and nonprofit hospitals, all of which are excluded

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[42] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

from the definition of "employer" contained in Section 2(2) of the Act. The language of 8(e) is itself clearly contrary to this holding for it states in pertinent part "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in the products of any other employer, or to cease doing business with any other person." The legislative history of 8(e) and of the 1959 amendments to the secondary boycott provisions of the Taft-Hartley Act demonstrate, moreover, that Congress clearly understood that by the use of the words "any employer" in 8(e) they were limiting the jurisdictional reach of the section to employers as defined in Section 2(2).

As the majority opinion herein makes clear, Section 8(e) and 8(b)(4)(A) and (B) were the end results of efforts to amend Section 8(b)(4)(A) of the Taft-Hartley Act to expand the secondary boycott prohibitions to include restraint and coercion of employers, inducement of individuals employed by any person, and to the entering into and enforcement of hot cargo contracts. The purpose of the amendments was explained by Senators Goldwater and Dirksen in their minority report on S. 1555:

> The major loopholes in the present ban on secondary boycotts are:
>
> (1) *Coercion of employers*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purposes of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the "employees" of the other employer. Nothing is said about urging or persuading the employer of the secondary employees....

The bill, S. 748, meets this problem by amending section 8(b)(4) of the present law to make the restriction apply to "threaten, coerce or restrain any person engaged in commerce . . ." as well as "induce or encourage any individual employed by any person."

(2) *Hot-cargo clauses*—It has become common to find clauses in union contracts whereby the employer agrees not to handle what the union chooses to call "hot goods," "unfair materials," and "blacklisted products." . . .

* * * * * * * * *

S. 748 makes it an unfair labor practice for a union to coerce an employer to enter into such an agreement, or having entered into it, for a union to coerce the employer to live up to it, or to induce his employees to take economic action to force the employer to live up to it. Only the latter is now lawful under the Taft-Hartley Act.

(3) *Boycotts by railroad employees, agricultural workers, Government employees, and other groups now excluded from the secondary boycott ban of the Taft-Hartley Act.* Under the definition section of the Taft-Hartley Act railroad employees, agricultural workers, and governmental employees are not employees within the meaning of the act. The Board has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices. (See *International Rice Milling*, 84 NLRB 360, and *Di Giorgio Wines*, 87 NLRB No. 125.)

Secondary boycotts by these groups are just as much against the public interest as boycotts by anyone else.

The bill, S. 748, would extend the ban to these excluded categories by use of the words "any person"

> instead of the use of the words "employees of any employer" in section 8(b)(4)(i) and (ii).[43]

After S. 748 was introduced on the Senate floor, Senator Goldwater explained:

> The word "person" is used in the proposed amendment to the secondary boycott provision rather than "employer," in order to extend the protection of the secondary boycott provisions of the act to public employers, railroads, or agricultural enterprises without subjecting them to other provisions of the act.[44]

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[43] I Leg. Hist. 475-476. My colleagues omit the last paragraph of the quoted excerpt. See also Senator Goldwater's extension of remarks in the Congressional Record for October 2, 1959, II Leg. Hist. 1858. In fn. 37 of the majority opinion, my colleagues quote from another extension of remarks by Senator Goldwater to the effect that "Now the term 'employer' is actually employer in its dictionary sense." Since they emphasize that passage, they must regard it as significant. The passage comes from an interview with a staff member of the Senate Labor Committee reported in a news magazine. Though Senator Goldwater obviously thought the interview aided an understanding of the amendments to the Act then recently passed by Congress, such views hardly constitute authoritative legislative history as to the precise meaning of statutory language. However that may be, one should use the whole of the relevant material. The record will show that immediately before the statement quoted by my colleagues, the staff member stated:

> The term "employer" as it is defined in the Taft-Hartley Act excludes certain types of employers. Among them, the most important being railroad employers and their employees, because they are covered under the Railway Labor Act.
>
> * * * * *
>
> Now, under this new bill, instead of using the term, "to cease doing business with another employer," it says "to cease doing business with any other person." Person includes everybody. That closes that loophole. [II Leg. Hist. 1829.]

[44] II Leg. Hist. 1079.

Although my colleagues quote from the same passages, they omit the explanation in the minority report and by Senator Goldwater on the floor of the Senate that the objectives sought to be achieved were to be achieved by the elimination of the words "employees of any employer" and "employer" and the use instead of the words "individuals employed by any person" and "person." It is apparent that the sponsors of S. 748 were clear in their mind that the retention of the words "any employer" would not achieve their objective of proscribing boycotts and the inducement of boycotts of employees in industries exempted from the coverage of the Act either by exclusion of the employing entity from the definition of "employer" in Section 2(2) of the Act or by exclusion of the workers from the definition of "employee" in Section 2(3) of the Act. The sponsors of the legislation in effect rejected the rationale of the decision in *International Rice Milling Co., Inc.* v. *N.L.R.B.*,[45] in which the court of appeals construed the words "any employer" in Section 8(b)(4)(A) of the Taft-Hartley Act to embrace "the class of employers as a whole, and not merely those within the definition of 'employer' ",[46] and in effect ratified the Board's *International Rice Milling*[47] holding that the Taft-Hartley Act's secondary boycott provisions were not couched in language broad enough to reach the conduct in question. To rectify the situation created by the limiting language of the Taft-Hartley Act, Congress amended the Act by the use of broader language.

Moreover, there is persuasive evidence in the language of Section 8(b)(4) itself to indicate that the 1959 amendments were not intended to give a broader reach to the words "any employer." In addition to the cease doing business

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[45] 183 F.2d 21 (C.A. 5).

[46] *Id.* at 25.

[47] 84 NLRB 360.

objective of Section 8(b)(4)(B), that section proscribes "forcing or requiring *any other employer* [emphasis supplied] to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9." Section 8(b)(4)(C) proscribes "forcing or requiring *any employer* [emphasis supplied] to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9." Section 8(b)(4)(D) proscribes "forcing or requiring *any employer* [emphasis supplied] to assign particular work to employees in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless *such employer* [emphasis supplied] is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Manifestly the words "any other employer" and "any employer" appearing in those subsections of Section 8(b)(4) are limited to "employer" as defined in Section 2(2) for those are the only employers for whose employees a labor organization can become a certified representative under Section 9. Those provisions with their use of the words "any employer" remain the same today as before the 1959 amendments, and it can hardly be supposed that merely because Congress saw fit to close loopholes in the secondary boycott provisions of the Act to reach inducement of "any individual employed by any person" and to proscribe threats, coercion, and restraint of "any person engaged in commerce or in an industry affecting commerce" that it changed the meaning of the words "any employer" in those provisions to mean any person or to mean employer in the generic sense. This must necessarily be so, for if it is not, then the words "an employer" in Section 9(c)(1)(B) must be read as embracing "the class of employers as a

whole, and not merely those within the definition of 'employer'." Then, too, the words "any employer" in Section 8(b)(7) must be given the broader reach. Clearly a construction which gives operative words a meaning other than the carefully drawn statutory definition and which has such far reaching consequences carries a heavy burden of proof that that is what Congress intended. That burden has not been met here as is shown conclusively by the provisions of 8(b)(4)(A).

Section 8(b)(4)(A) proscribes forcing or requiring "any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e)." It is significant that the words "any employer" were not introduced into Section 8(b)(4)(A) after the addition of Section 8(e). S. 748, which contained no 8(e) provision—though it did contain a provision in 8(b)(4)(B) proscribing "forcing or requiring any person . . . to agree to cease doing business with any other person"—also contained a provision in 8(b)(4)(A) proscribing "forcing or requiring any employer or self-employed person to join any labor or employer organization." These words were of course part of former 8(b)(4)(A), and it is obvious that they were used then in the statutory definition sense. It follows that when Congress amended 8(b)(4)(A) by adding after the words "employer organization" the words "or to enter into any agreement which is prohibited by Section 8(e)" it did not intend to give a broader meaning to the words "any employer."

Of course, the history of 8(e) follows the same course. As set forth in the majority opinion, herein, Senator Gore introduced an amendment limiting the ban on entering into hot cargo clauses to agreements between labor organizations and "any employer who is a common carrier subject to Part II of the Interstate Commerce Act." Here the words "any employer" are limited in scope to common carriers subject to part II of the Interstate Commerce Act, and there

is no room for any argument in this first version of 8(e) that they were intended to mean employer in the generic sense. The Landrum-Griffin bill as it passed the House, however, contained the provisions of 8(e) as finally enacted by adoption of the conference bill, except for the special provisos for the building and construction and the garment industries which were added in conference. The legislative history of that provsion reveals no statements by proponents explaining that the coverage of the section would extend to railroads, airlines, and other exempt employers. Careful examination of the remarks of Representative Landrum and Griffin and Senator Kennedy quoted by the majority reveals that their references to railroads and other exempt employers were with respect to the coverage of 8(b)(4)(B). Though they agreed that the proposed limited ban on hot cargo clauses was too narrow, and should extend to all employers, none of them contended that elimination of the limiting clause "common carriers subject to Part II of the Interstate Commerce Act" would subject exempt employers to the proscriptions of the Act as well as give them protection from secondary boycotts. Representative of the explanations of congressional intention are Senator Goldwater's remarks entered into the Congressional Record on October 2, 1959. In the same memorandum in which he analyzed the amendments to 8(b)(4)(i) and (ii)(B) referred to earlier, Senator Goldwater described the reach of Section 8(e) as enacted:

> Neither the Kennedy-Ervin bill (S. 505) as introduced, nor the committee bill as reported to the Senate, contained any provision dealing with "hot cargo" agreements. In committee my rejected amendment on secondary boycotts contained a provision outlawing such agreements. On the floor, the Senate adopted an amendment outlawing "hot cargo" agreements only where they were between labor unions and employers who are common carriers subject to part II of the Interstate Commerce Act. This was designed to get at Jimmy Hoffa and the Teamsters Union exclusively. But it failed to do even that.

> Common carriers subject to part II of the Interstate Commerce Act represent only a part of the jurisdiction of the Teamsters Union. Other carriers and transportation enterprises not under part II of that act also employ members of and bargain collectively with the Teamsters Union. This is also true of the warehousing industry, the storage industry, and some segments of the retailing and wholesaling industries. "Hot cargo" agreements in these industries, involving mainly the Teamsters Union, would have been unaffected by the provision in the Senate passed bill.
>
> The basic ban on "hot cargo" agreements in the new section 8(e), as described above, is contained in the Landrum-Griffin bill, and with the exemptions and modifications described above, was accepted by the Conferees.[48]

Internally, Section 8(e) supports the conclusion that "employer" as used in 8(e) does not mean "person." Section 8(e) uses both the words "any employer" and "any other person." The unfair labor practice is "entering into any contract or agreement" by "any labor organization and any employer . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . ." If the words "any employer" are to be construed as "person" as my colleagues conclude, then so must the words "any other employer" be construed as "any other person." If that is a proper construction then the last phrase "or to cease doing business with any other person" is sheer surplusage. If, however, the section is construed to give both terms their statutorily defined meaning, the last clause has a legislative purpose, for it expands the scope of the unfair labor practice to include agreements whereby an employer ceases doing business with not only "any other employer" but with "any other person."

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[48] II Leg. Hist. 1858.

Nor do I regard the conference committee's action of striking the words "or agree to cease" from 8(b)(4)(i) and (ii)(B) of the House bill in order to avoid a duplication of language contained in the restrictions against entering into hot cargo agreements as a sufficient basis for disregarding the literal language of those sections. In the first place, such language did clearly duplicate the restrictions imposed by 8(b)(4)(A) and 8(e). The fact that the clause may have had a slightly broader reach—it would have explicitly precluded a union from bringing (i) and (ii) pressure against a "person" to force or require that person to agree to cease doing business with another person, whereas 8(b)(4)(A) only proscribes such pressures when the object is to force an employer to agree to cease doing business with a person—is hardly a sufficient basis for finding that Congress intended to prohibit exempt employers from voluntarily entering into such agreements. Moreover, it is not even clear that elimination of the clause would preclude a finding of unfair labor practices against a union which sought to force a person *to agree to cease* doing business with another person. For certainly any strike that has the objective of forcing a person to sign such an agreement also has as an object forcing the cessation of the existing business relationship, an object which is proscribed by the present language of 8(b)(4)(B).

Finally, my colleagues' reliance on the language of the *National Woodwork*[49] decision of the Supreme Court is not helpful to their case. For it is obvious that the Court was speaking there of the substantive correlation between the two sections and not of their jurisdictional reach. More in point to the question before us is the Court's statement in *Railroad Trainmen*[50] that Section 8(e) did not reach purely

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[49] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612.

[50] *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369.

railroad labor disputes. For if the words "any employer" as used in 8(e) are to be read as "any person" in order to subject an exempt employer to the prohibitions of that section, they must necessarily be so construed in all cases, and the words "any labor organization" must also be construed to reach the class of labor organizations as a whole. There is no halfway house on the broad construction road my colleagues would travel. Either 8(e) applies to all agreements betwen all unions and employers or it applies only to those agreements between statutory labor organizations and statutory employers. I am convinced that it is the latter construction that is correct.

Dated, Washington, D.C.

May 31, 1972

JOHN H. FANNING, Member
National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain in effect, give effect to, or enforce any contract or agreement, express or implied, between Lufthansa German Airlines and International Association of Machinists & Aerospace Workers, AFL-CIO, whereby Lufthansa German Airlines ceases or refrains or agrees to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation, in violation of Section 8(e) of the Act.

WE WILL NOT enforce or maintain in effect the memorandum of understanding contained in the collective-bargaining agreement signed by Lufthansa German Airlines and International Association of Machinists & Aerospace Workers, AFL-CIO, on February 12, 1971, insofar as it requires Lufthansa to cease doing business with Marriott.

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

LUFTHANSA GERMAN AIRLINES
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213—824-7351.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1990

MARRIOTT CORPORATION, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2129

INTERNATIONAL ASSN. OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2207

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

LUFTHANSA GERMAN AIRLINES, *Respondent.*

[January 9, 1974]

On Petitions for Review and Cross-Application for Enforcement and on Application for Enforcement of an Order of the National Labor Relations Board.

Before: TRASK and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

GOODWIN, Circuit Judge:

The National Labor Relations Board seeks enforcement of an order vitiating a "hot cargo" agreement between an airline-employer subject to the Railway Labor Act, 45 U.S.C. § 151 et seq., and a union representing catering em-

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

ployees. In the companion case, the food-service contractor injured by the boycott seeks damages. The administrative decision is reported as *Machinists Union*, 197 N.L.R.B. No. 18, 80 L.R.R.M. 1305 (May 31, 1972).

The Marriott Corporation alleged unfair labor practices under § 8(e) of the Labor-Management Relations Act (LMRA), 1947, 29 U.S.C. § 158(e),[1] by Lufthansa German Airlines and the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), the exclusive collective-bargaining representative of Lufthansa's catering employees. IAM appeals the NLRB ruling which found an unfair labor practice, and the Board petitions for enforcement of its order against both IAM and Lufthansa.

I. Jurisdiction

The jurisdiction of the NLRB was asserted under §§ 8(e) and 10(a) of the LMRA, 29 U.S.C. §§ 158(e) and 160(a). The union contends that the Board has no jurisdiction because one party to the challenged contract is a regulated carrier under the Railway Labor Act.

Since 1961, Lufthansa has recognized IAM as the exclusive bargaining representative for all Lufthansa em-

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[1] This section was added to the Act in 1959, and, in relevant part, provides:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *."

Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B), forbids a labor organization to cause any individual employed by any person to engage in certain conduct designed to force or require any person to cease doing business with any other person.

ployees engaged in its food catering department. Lufthansa has employed its own catering crews in New York City, and has contracted for catering services at other airports from which it operates. This practice was reflected in collective-bargaining agreements executed by Lufthansa and IAM for the years 1964-70. As of 1969, Lufthansa had contracts with Marriott, a nonunion caterer, for Chicago and Los Angeles food service, and was discussing a contract for certain John F. Kennedy Airport catering services. IAM voiced its disapproval of Lufthansa's contracts with a nonunion caterer, and eventually, in 1971, Lufthansa and IAM executed a renewal collective-bargaining agreement containing a provision which in effect required Lufthansa to cease doing business with Marriott and to contract only with union caterers. When Lufthansa informed Marriott that the airline would have to terminate the Los Angeles and Chicago contracts, Marriott instituted these proceedings.

For the purposes of the LMRA, a "labor organization" is defined in terms of its function as between "employees" and "employers," 29 U.S.C. § 152(5), and "employees" and "employers" are defined, in relevant part, as not including "any person subject to the Railway Labor Act." 29 U.S.C. §§ 152(2), (3). Lufthansa is a carrier by air within the meaning of § 201 of the Railway Labor Act, 45 U.S.C. § 181, and therefore, is not an employer within the meaning of § 2(2) of the Labor-Management Relations Act.

Based upon its findings that 88 percent of IAM's members are employees within the meaning of § 2(3) of the LMRA, and that more than 96 per cent of IAM's collective-bargaining agreements are with employers within the meaning of § 2(2) of the Act, the Board concluded that IAM is a labor organization within the meaning of § 2(5) of the Act. The Board further found that the IAM-Lufthansa agreement was primarily aimed at Marriott and Marriott's status as a nonunion caterer, and was not for the purpose of preserving work for unit employees, and therefore consti-

tuted an unlawful hot-cargo agreement. *See Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967).

Because the findings made by the Board were supported by substantial evidence, and because the inferences drawn by the Board were reasonable, we have no basis to deny enforcement of the Board's order. *See ICC* v. *Louisville & N.R.R.*, 227 U.S. 88, 94 (1913); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951); *NLRB* v. *Winkel Motors, Inc.*, 443 F.2d 38 (9th Cir. 1971); *NLRB* v. *Millmen & Cabinet Makers, Local 550*, 367 F.2d 953 (9th Cir. 1966).

The Board was required to decide whether Congress, in enacting § 8(e) of the LMRA, intended to outlaw hot-cargo agreements only when they were executed by statutory "labor organizations" and "employers" or whether, despite the seemingly clear language of the section, Congress intended to enact in § 8(e) a ban on hot-cargo agreements as broad as the ban of § 8(b)(4)(B), which applies not merely to any statutory "employer" but to "any person."

The Board, after analyzing the case law[2] and legislative history concluded that the latter, broader interpretation of § 8(e) was correct and that the Board therefore had the power under § 8(e) to rule upon the IAM-Lufthansa agreement. The Board found support for this conclusion in the fact that this case involved not a "pure and simple" dispute between an air carrier and its employees' union over the terms and conditions of the airline employees' employment, but rather a dispute between the air carrier and the union, on the one hand, and a non-carrier (Marriott) and on the other, with regard to employment conditions affecting non-carrier employees. *Cf. Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 377 (1969); *Teamsters Union* v. *New York, N.H. & H.R. Co.*, 350 U.S. 155 (1956).

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[2] *Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

We have examined the reasoning of the majority of the Board in light of the statutory language, the related legislative history, and the case law and find it convincing. Whether the issue involves a jurisdictional determination or a substantive application, the experienced judgment of the Board is entitled to great weight on such questions of law and statutory interpretation. *See Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 681-82 n.1 (1944); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *NLRB* v. *Retail Clerks Int'l Ass'n*, 243 F.2d 777, 779 n.2 (9th Cir. 1956). The cease-and-desist order is entitled to enforcement.

II. Compensatory Damages and Litigation Costs

Marriott sought from the Board an order requiring the union to pay compensatory damages for lost business and costs of redress. The Board's order failed, without comment, to provide such relief. Section 10(c) of the LMRA, 29 U.S.C. § 160(c), authorizing the Board to enjoin employers and unions from violating the Act and to order them to take affirmative action, has been construed as giving the Board broad authority to create new remedies. *See, e.g., Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 46 (1942).

Whether and to what extent damages may serve the policies of the Act in a given case is a complex problem for the Board to decide in light of its administrative experience and knowledge. The primary purpose of the Act is to protect the public interest and the policies of the Act by mitigating the effects of the violation and preventing future violations. Compensation, like any other remedy, should be ordered only when it will serve this primary purpose. See, *e.g., UAW* v. *Russell*, 356 U.S. 634, 642-43 (1958).

In this case, the language of § 8(e) at least supports the view that the Board might not have jurisdiction. It was only after resort to the legislative history and careful consideration thereof that the Board settled upon a reading of

that section which rendered the Lufthansa-IAM agreement an unfair labor practice within the Board's jurisdiction. We cannot say, therefore, that the Board abused its discretion in not awarding damages. Accordingly, we do not revise the Board's order. We express no opinion on the power of the Board to award such affirmative relief. *See Lipman Motors* v. *NLRB*, 451 F.2d 823, 828-29 (2d Cir. 1971); *Herald Co.* v. *NLRB*, 444 F.2d 430 (2d Cir.), *cert. denied* 404 U.S. 990 (1971). *Cf. Food Store Employees, Local 347*, 476 F.2d 546 (D.C. Cir. 1973).

In its brief in this court, Marriott has for the first time requested reimbursement for litigation expenses. Section 10(e) of the LMRA, 29 U.S.C. § 160(e), provides that no objection not urged before the Board may be considered by the court unless excused by extraordinary circumstances. Marriott has not shown the necessary extraordinary circumstances to excuse its failure to request costs and attorney fees before the Board. *See NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *NLRB* v. *Swain & Morris Constr. Co.*, 431 F.2d 861 (9th Cir. 1970). Therefore, Marriott's request for reimbursement of costs and attorney fees must be denied.

The Board will prepare and submit a judgment enforcing its order.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NORTH CIRCUIT
U.S. COURT OF APPEALS AND POST OFFICE BUILDING
7TH & MISSION STREETS, P.O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101

Re: No. 72-1990, 72-2129, 72-2207 MARRIOTT CORPORATION VS. NLRB, INTERNATIONAL ASSN. OF MACHINIST ETC. & LUFTHANSA GERMAN AIRLINES ETC.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered *1-9-74* enforcing the judgment or order of the court below (or administrative agency). The Board will prepare & submit a judgment enforcing its order.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1990

NLRB # 31CE 28

MARRIOTT CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2129

INTERNATIONAL ASSN. OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 72-2207

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LUFTHANSA GERMAN AIRLINES, *Respondent.*

Before TRASK and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

Filed February 7, 1974

Order

The Petition for rehearing filed by petitioner International Assn. of Machinists & Aerospace Workers, AFL-CIO, January 23, 1974, is

DENIED.

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* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

[Same Case]

Judgment

Filed April 19, 1974

Before: Trask and Goodwin, Circuit Judges, and Thompson,* District Judge.

This Cause came on to be heard upon petitions to review, cross-application and application for enforcement of an order of the National Labor Relations Board issued on May 31, 1972, against International Association of Machinists & Aerospace Workers, AFL-CIO, its officers, agents, and representatives, and Lufthansa German Airlines, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on November 6, 1973, and has considered the briefs and transcript of record filed in this cause. On January 9, 1974, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

Ordered and Adjudged by the Court that International Association of Machinists & Aerospace Workers, AFL-CIO, its officers, agents, and representatives, and Lufthansa German Airlines, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining in effect, giving effect to, or enforcing a memorandum of understanding contained in a collective-bargaining agreement entered into by the between Respondent International Association of Machinists & Aerospace Workers, AFL-CIO, and Respondent Lufthansa German Airlines on or about February 12, 1971, whereby Respondent Lufthansa German Airlines ceased or refrained or agreed to cease or refrain from doing business with

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

Marriott In-Flite Services, Division of Marriott Corporation.

(b) Entering into, enforcing, or giving effect to any other contract or agreement, express or implied, whereby Respondent Lufthansa German Airlines ceases or refrains or agrees to cease or refrain from doing business with Marriott In-Flite Services, Division of Marriott Corporation.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the National Labor Relations Act:

(a) Post at the business offices and meeting halls of the aforesaid Union, and at the catering department facilities of the aforesaid Company in New York, Chicago, Los Angeles, Boston, Anchorage, and Philadelphia, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 31, (Los Angeles, California), after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondents have taken to comply herewith.

Endorsed, Judgment Filed and Entered

April 19, 1974

/s/ Emil E. Melfi, Jr.
Emil E. Melfi, Jr.
Chief Deputy and Acting Clerk

[The Notice to be posted has not been reprinted. It is identical with the Notice at p. 34a *supra*, except that it states that it is "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of The National Labor Relations Board."]